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No. 94-1781

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

ATTORNEY R.,

Petitioner,

V.

THE MISSISSIPPI BAR,

Respondent.

On Petition for Writ of Certiorari to the Mississippi Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court's requirement that a disclaimer implying that neither the Court nor the State of Mississippi has established a plan of certification or specialization for attorneys to be used in attorney's advertisements listing areas of practice is constitutional on its face?

2. Whether Rules 7.1, 7.2 and 7.4, Mississippi Rules of Professional Conduct, violate any of Attorney R's constitutional rights?

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RESPONDENT'S BRIEF IN OPPOSITION

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Attorney R, prayed that a Writ of Certiorari be issued to review the Judgment of the Supreme Court of Mississippi in this matter but has not presented persuasive reasons why certiorari should be granted.

OPINIONS BELOW

The ruling of the Mississippi Supreme Court from which the Petitioner seeks certiorari is included in the case styled *Attorney R. v. The Mississippi Bar* , 649 So. 2d. 820 (Miss. 1995), reproduced in Petitioner's Appendix dated April 26, 1995 wherein a Private Reprimand was issued to him (A 1a-20a). At trial, a Complaint Tribunal of the Mississippi Supreme Court also imposed a Private Reprimand, a decision affirmed by the Mississippi Supreme Court which heard the case de novo on the record made before the Complaint Tribunal. A copy of the Complaint Tribunal's decision is also included in Petitioner's Appendix. (A21a - 36a)

JURISDICTION

As grounds upon which Attorney R alleges this Court has jurisdiction, he represented that in its January 26, 1995 opinion the Mississippi Supreme Court held that Rules 7.1 (a and b), 7.2 (a and f) and 7.4 (a and b) of the Mississippi Rules of Professional Conduct as applied against him, were not unconstitutional or violative of his First Amendment right to freedom of speech.

However, in the opinion attributed to the Mississippi Supreme Court by Attorney R, produced in Attorney R's Appendix, the Mississippi Supreme Court only addressed Rules 7.1 (a), 7.2 (f) and 7.4 (a) and (b), MRPC. Rules 7.1 (b) and 7.2 (a) were not discussed in the Mississippi Supreme Court's opinion.

Regardless, the Bar denies that Attorney R has met the jurisdictional requirements of 28 USC §2101 (c) since 28 USC § 2101 (c) sets forth only the time limitations when an appeal or writ of certiorari must be filed with this Court. Therefore, the Mississippi Bar objects to this Court assuming jurisdiction over the instant Petition for Writ of Certiorari pursuant to the previous cited authority, said being, 28 USC §2101 (c).

Moreover, the Bar denies that the instant Petition for Writ of Certiorari is being filed pursuant to the provisions of Rule 10 (c) of this Court since the Mississippi Supreme Court has not decided an important issue of federal law in a way that conflicts with applicable decisions of this Court. The Mississippi Supreme Court's decision is consistent with this Court's decisions in *Bates v. State Bar of Arizona*, 433 US 350 (1977); *In Re R.M.J.*, 455 U.S. 191 (1982); *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990); and *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, 114 S. Ct. 2084 (1994).

SUMMARY OF THE ARGUMENT

United States Supreme Court Rule 10 (1) clearly sets forth the grounds which must be established in order for a Petition for a Writ of Certiorari to be granted:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor." See Rule 10 (1), U. S. Supreme Court Rules.

In the case sub judice there simply does not exist any "special important reason" to grant Petitioner's request for a writ since Mississippi's disclaimer requirement is in accord with this Court's previous decisions in the *Bates, R.M.J., Peel* and *Ibanez* decisions. As such, this case does not present any federal or state constitutional questions that have not already been addressed nor does it present any question upon which there is a conflict between the way a State court has decided a federal question that is in conflict with the aforementioned decisions of this Court.

To justify a grant of "certiorari", the special and important reasons involved " must be more than "academic or episodic", the issues must "reach

constitutional dimensions". *Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70 (1995). "[T]his Court does not sit to satisfy a scholarly interest. . . [n] or does it sit for the benefit of the particular litigant." *Rice*, 39 U.S. at 4 (citing *Mangum Import v. Cody*, 262 U. S. 159, 163 (1923)). As the Court in *Layne and Bowler Corporation v. Western Well Works, Inc.*, 261 U. S. 387 (1923), stated:

> [I]t is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. Id. 261 U. S. at 393.

Accordingly the instant dispute does not justify the granting of this petition for writ of certiorari especially since this Court has already addressed the issue of whether a disclaimer can be required by a State for attorneys who advertise their legal services and abilities.

The test established by this Court in *Board of Trustees of State University of New York v. Fox*, 109 S. Ct. 3028 (1989) ("SUNY"), requires only a "reasonable fit" between a rule regulating commercial speech and the state interests it advances. The listing of areas of practice of law without use of the required disclaimer misleads the public and promotes uninformed decision making.

Mississippi's disclaimer requirement is drafted to let potential consumers of legal services know that the State of Mississippi has not established a plan of certification or specialization for attorneys in order that they will not be misled into believing that because an attorney advertises that he practices in certain areas of law he is no more qualified than other attorneys who practice in those same areas of the law but, for various reasons, don't advertise or if they do advertise, don't list areas of law or if they advertise they practice in certain areas of the law, use the required disclaimer.

Mississippi's rule clearly withstands scrutiny under the SUNY test. Indeed, Mississippi's disclaimer requirement not only constitutes a "reasonable fit" but it would meet the "least restrictive means" analysis announced in Central Hudson, a test which SUNY subsequently expressly modified. Moreover, the disclaimer requirement is not a ban, an issue most of the other advertising decisions this Court addressed involve, but instead is a requirement to disclose more information, not less, an encouragement given by this Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In Re R.M.J.*,

455 U.S. 191 (1982); and, *Peel v. Illinois Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990).

Finally, the Mississippi's disclaimer is not overly broad as was the disclaimer requirements denounced by this Court in *Ibanez v. Florida Department of Business and Profession Regulatory, Board of Accountancy*, 114 S. Ct. 2084 (1994). Given the interests involved, the nature of the disclaimer which advances those interests and the "reasonable fit" between how those interests are advanced while not unreasonably limiting Attorney R's freedom of speech, Mississippi's disclaimer meets all constitutional requirements.

STATEMENT OF THE CASE

On July 27, 1990, and August 21, 1990 the Mississippi Bar filed Formal Complaints in the Supreme Court of Mississippi, accusing Attorney R of publishing false, deceptive and misleading communications about his legal services since he did not include in his advertisements the required disclaimer indicating that the State of Mississippi did not have in effect, a plan of certification or specialization for lawyers or that he possessed a certification from one or more of the legitimate certifying organizations. In his advertisement, Attorney R listed certain areas of practice along with phrases, such as, "protect your rights", "need help", "bankruptcy - a fresh start, not a failure" and "problem solving was (his) profession". Attorney R answered the Formal Complaints by denying that his

advertisements included false, misleading and deceptive communications about the legal services he offered. He also denied that he was obligated to use the State mandated disclaimer. Furthermore, he affirmatively stated that the aforesaid disclaimer requirement violated his First Amendment freedom of speech and Fourteenth Amendment right to due process of law.

Subsequently, the Bar filed a Motion for Summary Judgment. In response, Attorney R filed a Motion to Dismiss which was overruled. The Bar's Motion for Summary Judgment was sustained. The Tribunal found Attorney R in violation of several of Mississippi's Rules of Professional Conduct including failing to use the required disclaimer and imposed a private reprimand on him for his violations. Attorney R appealed this decision to the Mississippi Supreme Court which affirmed the Tribunal's ruling, including imposition of a private reprimand. From that adverse decision, Attorney R petitions this Court for a Writ of Certiorari.

I. REASONS FOR NOT GRANTING WRIT OF CERTIORARI

RESPONSE TO PROPOSITION ONE

The Mississippi Supreme Court requires the following disclaimer to be used in communications listing areas of practice: "LISTING OF THESE PREVIOUSLY MENTIONED AREAS OF PRACTICE DOES NOT INDICATE ANY CERTIFICATION OF EXPERTISE THEREIN". See Mississippi Rules of Professional Conduct 7.2 (f). This requirement does not constitute an impermissible restraint on truthful commercial speech and does not conflict with decisions[1] of this Court relating to First Amendment safeguards. Consequently, notwithstanding Attorney R's conclusion. the Mississippi Supreme Court has not decided a question involving federal law in a way that conflicts with applicable decisions of this Court. Therefore, there does not exist any "strong reason for granting of certiorari". *Hudson v. Louisiana*, 450 U.S. 40, 42 (1991).

In his Petition for Writ of Certiorari, Attorney R concludes, without citing any part of the record, the Mississippi Supreme Court's mandated

[1]See *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980) and *Board of Trustees of State University of New York v. Fox*,, 109 S. Ct. 3028 (1989).

disclaimer is "on its face. . . equally as likely to create confusion among consuming public between the terms 'ability', 'competence', 'limited fields of practice of law' and 'specialty'. (Petition for Certiorari p. 19)

Petitioner offers no proof or support for his conclusion. He merely makes a presumption. His presumption misinterprets what the disclaimer is saying. The required disclaimer says, either by implication or directly, that the State of Mississippi has not established any plan of certification whereby an attorney may advertise that he has earned a certification of expertise in a particular area of law from the State of Mississippi or that he had earned the right to use the endorsement that he has been certified by a legitimate private certifying organization. Moreover, the Mississippi Supreme Court has decided that the required disclaimer includes valuable information which should be presented to potential consumers of legal services without which the consumers would be misled concerning the attorney's expertise in a particular field of law.

Mississippi does not limit the areas of practice the lawyer may advertise. Instead, through its disclaimer requirement, it is providing information that neither the Mississippi Supreme Court nor the State of Mississippi has established a method or

procedure to grant certification of expertise to a lawyer in any area of practice.[2]

The required disclaimer is not an absolute ban on advertisements which list areas of practice but is an attempt to provide more information, not less, a procedure which has been specifically authorized by this court. *Bates v. State Bar of Arizona*, 97 S. Ct. 2709; *In Re R.M.J.*, 455 U.S. 191, 201-203; *Peel v. Attorney Regulatory and Disciplinary Commission*. 496 U.S. 91, 110 S. Ct. 2281, 58 U.S. L.W. 4684 (1990).

In *Peel*, this Court held that states may require a disclaimer about a private certifying organization. It held that a state may require the use of a disclaimer that the National Board of Trial Advocacy is a private organization not affiliated with or sanctioned by the state or federal government or information about the National Board of Trial Advocacy's (NBTA) requirements for certification so that inferences drawn by consumers about the certified attorney's qualifications would be based on more complete knowledge of the meaning of the NBTA certification.

Mississippi's required use of a disclaimer is not a proscription on the listing of areas of practice but requires when an attorney chooses to list areas of practice such advertisement must also include a notice that there is no state certification of expertise

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[2] Rule 7.4 (b) (1 & 2), MRPC, provides a lawyer who practices "patent" law may use the designation "patent attorney" and an attorney who practices "admiralty" law may so indicate.

in the area of law mentioned in the advertisement. In *Peel*, this Court ruled that it was permissible for the state to believe that many inferences, such as, consumers may believe that the NBTA was a state or federal government certifying organization, could be drawn from an advertisement and gave authority for the State to address those concerns. Therefore, if a state determines that it serves a substantial state interest or interests, it could require a disclaimer. Moreover, if it is permissible for a state to adopt a disclaimer to require the providing of more information concerning a private organization's certifying process, then, it is likewise permissible for a state to require disclosure that the state has not adopted any plan of certification of expertise in a particular field of law.

Since the mere listing of areas of legal practice in an advertisement implies specialization, certification or expertise beyond that of the average lawyer, a state may require that a disclaimer inform the viewer that "the state does not certify specialization nor does the advertisement claim certification or expertise in a given area". *In Re Goldin*, 689 S. W. 2d 869 (Tenn. 1985). However, Attorney R's advertisements, which were before the Mississippi Supreme Court when it made its decision, contain more than a mere listing of areas of legal practice. Attorney R's advertisements are herein reproduced, in substantial part , for the Court's convenience.

NEED HELP?
PROBLEM SOLVING IS OUR PROFESSION

INJURED
AUTO ACCIDENT (Reproduction of gavel is here) BANKRUPTCY
A FRESH START
NOT A FAILURE

FAULTY PRODUCTS
MEDICAL NEGLIGENCE INDIVIDUAL & FARMER
DEBT ADJUSTMENTS PLANS

WORKERS COMPENSATION BUSINESS REORGANIZATION

LIQUIDATIONS

(Map where office is located) PROTECT YOUR RIGHTS [Map where office is located)
R. CHARLES ROBB, P.A.[3]
ATTORNEY AT LAW
922-1111

Consequently, the representations included in Attorney R's advertisements are:

1. If someone is injured, he can help;

2. Bankruptcy provides a fresh start, not a failure;

3. Attorney R will protect your rights; and

4. Problem solving is his profession.

When these representations are read in conjunction with the areas of law listed in Attorney R's advertisement, it is clear that the message being conveyed is Attorney R is uniquely qualified to provide "help", he can give someone "a fresh start",

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[3]A copy of Attorney R's advertisements are included herein in Appendices"1" and "2".

and he will "protect 'your' rights" with respect to the areas of practice listed in his advertisement.

The Mississippi Rules of Professional Conduct recognize the many decisions of this Court limiting the restrictions on advertising to allow prohibitions against false, deceptive and misleading advertising or which concern illegal activity. Consequently, each State must tailor its restrictions based upon this Court's decisions. Previously, this Court relied on the two part test set forth in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York* , 447 U.S. 557 (1980) to decide the constitutionality of restrictions on commercial speech. However, *Central Hudson's* reasoning has been modified by this Court's decision in *Board of Trustees of the State University of New York v. Fox*, 109 S. Ct. 3028 (1989) requiring only a "reasonable fit" between a rule regulating commercial speech and the state interests the rule advances. Nevertheless, the requirements established by *Central Hudson* are helpful to a discussion for not granting certiorari especially since Mississippi's required disclaimer meets the "least restrictive means" test announced in *Central Hudson*.

First, advertising that is false, misleading or deceptive or which concerns illegal activity may be banned outright. Second, even if an advertisement is not covered by the initial prohibition, a State may still restrict the offensive advertisements if the following requirements are met:

1. The governmental interests involved in the restricting are substantial;

2. The restrictions directly advance the governmental interests involved; and

3. The restrictions are no more restrictive than necessary to serve those interests.

Consequently, based upon the Supreme Court's analysis, a lawyer's advertisement may be prohibited if it is false, deceptive or misleading or concerns illegal activity. If the advertisement is not subject to regulation on these grounds, it still may be regulated if the second prong of the *Central Hudson* test is satisfied.

For example, in *In re R.M.J.*, 455 U.S. 191 (1982), this Court addressed the issue of how extensively a State may regulate the use of terms describing an area of practice on grounds that those connotations may be misleading. At issue in *R.M.J.* was whether a lawyer could be prohibited from using any terms describing areas of practice other than the terminology expressly permitted by a state disciplinary rule. This Court affirmed the proposition that "when the particular content or method of the advertising suggest that it is inherently misleading or when experience has proven that the advertising is subject to abuse, the states may impose appropriate sanctions". 455 U.S. 191, 203.

In R.M.J., the Court affirmed that inherently misleading advertising may be prohibited entirely. However, the Court also held that terms describing areas of practice are not inherently misleading. Therefore, regulations covering the use of such terms must be drafted in a way they would restrict the use of terms and circumstances in which they would be misleading. The Court said "the States may not place an absolute prohibition on certain types of potentially misleading information, e.g. a listing of areas of practice, if the information may also be presented in a way that is not deceptive". 455 U.S. 191, 203. Applying this reasoning, this Court held that the disciplinary rule under review in *R.M.J.* which prohibited the use of all terms describing areas of practice not specifically allowed by the rule constituted an unconstitutional restriction on commercial speech because it prohibited use of other terms which were not misleading.

However, this Court's analysis in *R.M.J.* is not applicable to the situation involving Attorney R for several reasons. First, unlike Missouri's Rules of Professional Conduct, the Mississippi Rules of Professional Conduct (MRPC) do not require the use of words of "art" to describe particular fields of practice. The terms condemned in *R.M.J.* are clearly permissible under the applicable MRPC. Second, the MRPC do not absolutely prohibit the use of certain words or phrases to describe an area of practice. All that Rule 7.4 (a), MPRC, requires is that when a lawyer communicates the fact that the lawyer practices in particular fields of law, he must use the notice or disclaimer required by 7.2 (f),

MRPC. This requirement is intended to require the dissemination of truthful and helpful information to the public who reads the attorney's advertisements. The truthful and helpful information being communicated by the disclaimer is the "State of Mississippi does not have a plan of specialization whereby an attorney can proclaim that he has obtained a higher degree of expertise in a particular area of law than any other attorney in Mississippi".

Disclosure notices or disclaimers have been encouraged by this Court in at least two cases. In the landmark case of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court said:

> ". . . we do not foreclose the possibility that some limited supplementation by way of warning or disclaimer or the like, may be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled. 97 S. Ct. 2691, 2709

And in *Peel*, 110 S. Ct. 2281 (1990) when this Court looked at the alternative to the impermissible overbroad ban on statements of private certifications or specialization held that "a state might consider . . . requiring a disclaimer about the certifying organization or the standard of the specialty." 110 U. S. at 2292. See also *Mezrano v. Alabama State*

Bar, 434 So. 2d 732 (Ala. 1983) where the Alabama Supreme Court upheld the constitutionality of a rule requiring a disclaimer that "no representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services". In addition, in *Daves v. State Bar of Texas*, 691 S.W. 2d 784 (Court of Appeals of Texas, 1985) that Court upheld the constitutionality of Texas Disciplinary Rule 2-101 (c) (2) which requires the use of a disclaimer that the advertising attorney was "not certified by the Texas Board of Legal Specialization" when he advertised he could handle certain types of family law cases without disclosing his lack of certification.[4]

In upholding the constitutionality of Rule 2-101 (c) (2), the Texas Court held: "[w]e presume the Court intended DR 2-101 and so fashioned it, to comply with the restraints constitutionally permitted to prevent false, deceptive or misleading advertising" 691 S.W. 2d 784, 789.

As stated, Attorney R's advertisements include much more than a "mere listing of areas of practice". Through his use of phrases, "need help", "problem solving is our profession" and "bankruptcy - a fresh start, not a failure" he is representing to the readers of his advertisements that he is more qualified to "provide help", "solve the person's problems" and "through bankruptcy provide them with a fresh start, not a failure" than other attorneys. These representations, without presentation of his

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[4]The State of Texas has established a plan of certification.

qualifications to provide the quality of service he is representing, are inherently misleading or alternatively, potentially misleading. The Mississippi Bar argues that Attorney R's ads are both. Mississippi recognizes " the states may not place absolute prohibitions on certain types of potentially misleading information if the information may also be interpreted a way that is not deceptive." *R.M.J.* , 455 U.S. 191, 203.

Moreover, even if Attorney R's ads are not inherently misleading or potentially misleading they can be rejected if the state's restrictions satisfies the second prong of the *Central Hudson* test. Mississippi's disclaimer requirement satisfies this test because Mississippi has substantial governmental interests in regulating truthful and informative advertising. The restriction directly advances those governmental interests and the restriction is a "reasonable fit" to serve those interests.

First, the substantial governmental interests involved are to educate the public and assure readers of Attorney R's advertisements that they are being provided with truthful, accurate and not deceptive information about legal services they need and Attorney R's ability to provide those legal services. Two other state interests distinct from the interest in promoting informed decision making advanced by the Rules are facilitating the fair and effective administration of justice and the difficulty to police the advertisements (verify Attorney R's representations) because of the finite enforcement

resources of the state. See *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1958).

Second, the required use of a disclaimer directly advances those interests by requiring Attorney R to indicate that he is not certified by the State of Mississippi as an expert in any of the areas of law he is advertising. This requirement is uniformly applied to all attorneys who communicate they practice in any area of law except patent or admiralty. The "least restrictive means" test of *Central Hudson* is satisfied in this area, even though that test has been replaced by the "reasonable fit" test of *SUNY* which likewise has been met. Consequently, the required use of the disclaimer is a "reasonable fit" between Attorney R's right of freedom of speech and the State's right to reasonably regulate commercial speech which is no more extensive than necessary to serve the State of Mississippi's legitimate governmental interests. *Board of Trustees of the State University of New York v. Fox* , 109 S. Ct. 3028 (1989). *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico* , 478 U.S. 328, 341, 106 S. Ct. 2968, 2976-2977, 92 L. Ed 2d 266.

As long as the means are narrowly tailored to achieve the desired objective, it is for the governmental decision makers to judge what means or manner of regulation may be employed. *Board of Trustees of the State University of New York v. Fox* , 109 S. Ct. 3028, 3035 (1989). Therefore, Mississippi's required use of the disclaimer does not

constitute a ban. Instead it is a requirement intended to provide more information, not less.

In conclusion, under the test formulated in *SUNY,* Mississippi's required disclaimer clearly passes constitutional muster because it advances Mississippi interests and there is a "reasonable fit" between the rule and the ends it is designed to achieve". See *SUNY* at 109 S. Ct. 3032, 3035. Mississippi need only construct a reasonable fit. Mississippi has done that. Mississippi's disclaimer requirement meets the required constitutional requirements and, therefore, Attorney R's petition for writ of certiorari should be denied.

RESPONSE TO PROPOSITION TWO

The Mississippi Supreme Court has the inherent authority to adopt Rules of Professional Conduct that do not conflict with decisions of this Court involving the regulation of attorney advertisements requiring the use of a disclaimer that will make the advertisement more truthfully and informative. Mississippi's disclosure requirements are geared toward the "disclosure of accurate, truthful and relevant information that is more likely to make a positive contribution to decision making than is concealment of such information." *Peel v. Attorney Registration and Disciplinary Commission of Illinois* 496 U.S. 91, 108, 110 S. Ct. 2281,2292 (1990).

Attorney R argues that the Mississippi Supreme Court does not have the authority to

require disclosure of truthful, accurate and pertinent information in an attorney's advertisement, which the attorney did not disclose, under the premise that this Court's decision in *In Re RMJ*, 455 U.S. 191, 203 (1982) is limited to the words in the advertisement (underlining added as per Attorney R's emphasis). Attorney R acknowledges that the Mississippi Rule of Professional Conduct 7.1 (a) recognizes that a statement may be false, misleading or deceptive if it omits a statement which would make the communication as a whole misleading but insists the facts omitted must be inherently or potentially misleading. He further submits that this court has prohibited the use of permanent irrebuttable presumptions to justify this restriction as being unconstitutional. His argument is not persuasive.

The fact to be disclosed by use of the required disclaimer is this: the State of Mississippi has not established a plan of certification or specialization for attorneys licensed in the State of Mississippi. That is a fact, not a presumption. Neither Attorney R nor any other attorney can produce information or evidence to the contrary. Mississippi does not have such a plan of certification or specialization currently in effect. Consequently, Attorney R's reliance on *Cleveland Board of Education v. Lafleur* (Attorney R's citation was not able to be verified by the Bar) and *Vlandis v. Kline*, 412 U.S. 441, (1973) is misplaced. *Vlandis v. Kline* addressed Connecticut's irreversible and irrebuttable statutory presumption that because the legal address of a student, if married, was outside the state (of

Connecticut) at the time of application for admission, or if single, was outside the state at some point during the preceding year, he remained a non-resident as long as he is a student in Connecticut". 412 U.S. at 441.

In *Vlandis* , this Court ruled that it was a violation of the Fourteenth Amendment's due process clause for Connecticut to deny an individual the opportunity to present evidence that he is a bona fide resident entitled to in-state rates, on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the state of Connecticut had reasonable alternative means of making the crucial determination. Id at pp. 446-454.

In this case, Attorney R had the opportunity to present proof that Mississippi has established a plan of certification or specialization but because of the impossibility of being able to present that which does not exist, he couldn't. Therefore, he was not confronted with a irreversible presumption but a fact, an irrebuttable fact. In addition, he was authorized to present information that he had received certification from a private certifying organization, but he couldn't or didn't.

The disclaimer required to be used in this case is intended to materially advance substantial state interests in a manner that is no more extensive that necessary to serve those interests or at least a "reasonable fit" between the attorney's rights and the legitimate state interests involved. The manner in

which Attorney R's advertisements were presented are intended to convey the message that he is uniquely qualified, more so than similarly situated attorneys, to "solve problems", "give individuals a fresh start", "protect individuals rights" and provide" help" in those areas mentioned in his advertisements. The required disclaimer is not intended to ban the dissemination of truthful and accurate information. Instead, it is intended to require the disclosure of more truthful information, not less.

Moreover, because Attorney R's claims are not easily verifiable, if at all, the required disclaimer will make an even more positive contribution to the decision making process. [5]

However, even if there are legitimate, substantial, governmental interests involved, the required disclaimer must be a "reasonable fit" between the substantial governmental interests being advanced by this requirement and the restrictions shall be no more restrictive than necessary. In *Ibanez v. Florida Department of Business and Professional Regulations, Board of Accountancy*, 114 S. Ct. 2084, 2090 (1994) this Court condemned the use of a disclaimer that is too "detailed". The Florida disclaimer required:

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[5]For instance, if attorney R was certified by the National Board of Trial Advocacy, Civil Law, or The American Bankruptcy Board he could so advertise. These certifications are easily verifiable.

1. To be made in "the immediate proximity of the statement that implies formal recognition as a specialist";

2. Must state that the recognizing agency is not affiliated with or sanctioned by the state or federal government; and,

3. Must set out the recognizing agency's "requirements for recognition including, but not limited to educational, experience and testing. Id at 2090.

Mississippi's required disclaimer is comprised of sixteen (16) words totaling approximately 97 letters.[6] Accordingly, Mississippi's disclaimer requirement satisfies all of this Court's previous opinions and this Court should deny Attorney R's Petition for Writ of Certiorari. Moreover, Attorney R has not alleged that the required disclaimer is too long or extensive to destroy the intended message or appearance of his advertisements.

RESPONSE TO PROPOSITION THREE

Notwithstanding Attorney R's reservation to argue Proposition Three in the event certiorari is

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[6]Notwithstanding Attorney R's reference to the size of the print requirements, that requirement has not been enforced nor was Attorney R charged with violation of that portion of the subject rule. Furthermore, the Mississippi Supreme Court's ruling does not fault Petitioner for failing to meet this requirement. Therefore, that part of the rule was not before the Mississippi Supreme Court nor is it before this Court.

granted on either propositions one, two or both, the Bar responds that Attorney R was not deprived of equal protection of the law afforded him by the Fourteenth Amendment of the Constitution of the United States of America when he was sanctioned for failing to include the required disclaimer in his advertisement and his other consequent violations of the Mississippi Rules of Professional Conduct.

CONCLUSION

States may prohibit inherently misleading advertisements. Alternatively, States may prohibit potentially misleading advertisements provided the test announced in the *SUNY* case is met. That test has been satisfied. Mississippi's required disclaimer is intended to produce disclosure of more truthful and pertinent information, not less. It is intended to inform the readers of attorney advertising that if an attorney chooses to list areas of practice in his public communications, then, he must also inform those readers that his listing of areas of practice does not indicate that he possesses any certification of expertise therein by the State of Mississippi or any agency of the State of Mississippi that is any different than that possessed by any other attorney licensed to practice law by the State of Mississippi.

Accordingly, certiorari should be denied.

Respectfully Submitted,

The Mississippi Bar

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